BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT D. COX	)	
Claimant	)	
	)	
VS.	)	
	)	
LAFARGE KCK, INC.	)	
Respondent	)	Docket No. 1,051,506
	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the September 17, 2010 Preliminary hearing Decision entered by Administrative Law Judge Marcia Yates Roberts.

ISSUES

Claimant alleges he injured his back driving a concrete truck in a series of repetitive traumas from March 5 through June 2, 2010.[1] In the September 17, 2010, Preliminary Decision, the ALJ determined that claimant had provided respondent with timely notice of his injury. Consequently, the ALJ (1) designated Dr. Striebinger as the authorized treating physician, (2) ordered respondent to reimburse claimant $500 for unauthorized medical expense, and (3) ordered respondent to pay claimant temporary total disability benefits.

Respondent denies that claimant sustained repetitive traumas but, instead, contends claimant sustained a single trauma sometime in February 2010. Accordingly, respondent contends claimant failed to provide timely notice of the accident as respondent was not notified until June 3, 2010.

[1] P.H. Trans. at 4.

Claimant contends he injured his back from the continuous bouncing and jarring from the concrete truck that he had driven for 18 years for respondent. Claimant alleges his last day of work for respondent was June 2, 2010, and that on June 9, 2010, the authorized physician took him off work. Consequently, claimant maintains that either June 2 or June 9, 2010, is the appropriate date of accident for this alleged series of injuries and, therefore, the notice to respondent on June 3, 2010, was timely. In short, claimant argues the Preliminary Decision should be affirmed.

The issues before the Board on this appeal are:

1. What is the date of accident?

2. Did claimant provide respondent with timely notice of the alleged accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is 59 years old and has a long history of back problems. At age 10 claimant fractured his back when he fell from a tree. In 1976, claimant was run over by a jeep; however, he believes that incident primarily injured his shoulders and ribs. In 1992, claimant experienced some paralysis from his waist down and in 1997, he was diagnosed with a herniated disk. Claimant has known for quite some time that he has degenerative disk disease in his back.

Despite these problems, claimant drove a concrete truck for respondent for more than 18 years. During that period he was jarred and jostled as the large truck rolled over bumps and dips. Claimant also testified that he often would be jerked about when his seat belt locked up while going over rough roadways. He reported one such incident to his physical therapist; occurring in February 2010; nonetheless, claimant denies that incident precipitated his present back problems.

In March 2010, claimant began having increased pain in his lower back and hip. As he continued to work his symptoms worsened. Later that month claimant sought treatment from his family doctor, Dr. Randy D. Eaton, who prescribed medications. Claimant reported to the doctor that his back problems had started a week or two earlier. In addition, claimant informed his doctor that he did not want an MRI or epidural steroid injections at that point; and he was adamant he did not want back surgery. Dr. Eaton's March 25, 2010, office notes read, in part:

> . . . The patient's second concern today is he is having ongoing low back pain. The patient has had a history of back pain for years. He is noticing pain that radiates down into his right leg. He has a history of disk disease.
>
> . . . appears to be in no acute distress. . . . He has decreased range of motion. He does have some tenderness to palpation in the paraspinal muscles in the lumbar region. Leg raises are negative.[2]

By the end of April 2010, claimant's back pain had worsened. Claimant returned to his family doctor and on April 28, 2010, he underwent an MRI. The MRI results revealed an aortic aneurysm; consequently, claimant promptly consulted a cardiologist. The MRI also revealed a moderate sized disk protrusion at L4-5, which appeared to compress the L5 nerve root and produce both central and lateral stenosis. Another protrusion appeared at L5-S1, which was causing mild central canal stenosis.

Meanwhile, claimant's back symptoms remained unresolved. Towards the end of May 2010 claimant began noting increased symptoms going into his right leg and foot, which he attributed to an inflamed sciatic nerve. Claimant worked for respondent through approximately May 25, 2010, when he was laid off for reasons other than his back problems. He was scheduled to return to work on June 1, 2010, but he was unable.[3] On June 2, 2010, claimant sought medical treatment at the emergency room of the Olathe Medical Center, where he received Morphine and Valium for his pain. The next day claimant received a spinal injection.

Claimant testified he told a supervisor, Doug Berger, on June 3, 2010, about his back injury and that Mr. Berger agreed to process the necessary documents for workers compensation benefits. Earlier that day, claimant learned that if he did not significantly improve in two weeks that surgery would be indicated. Claimant's wife later spoke with a nurse employed by respondent who indicated respondent's workers compensation insurance carrier would be contacted. Indeed, on either June 7 or 8, 2010, the insurance carrier contacted claimant and his wife.

In September 2010 claimant was examined by Dr. Edward J. Prostic, an orthopedic surgeon. After examining claimant and reviewing his medical history, Dr. Prostic commented that claimant had "sustained repetitious minor trauma to his low back with protrusion of disc at L4-L5 and development of radiculopathy."[4]

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[2] P.H. Trans., Resp. Ex. A at 1 (Dr. Eaton's Mar. 25, 2010 office note).

[3] *Id.* at 20.

[4] *Id.*, Cl. Ex. 2 at 2 (Dr. Prostic's Sept. 8, 2010 report).

The ALJ rejected respondent's argument that claimant had failed to provide it with timely notice of the accident. This Board Member agrees. At this juncture, the greater weight of the evidence indicates claimant injured his back from the repetitive jostling and jarring he sustained while driving for respondent. The medical evidence shows a definite worsening of claimant's condition between late March 2010, when claimant visited his personal physician, and June 2, 2010, when he sought emergency medical treatment at the Olathe Medical Center. Furthermore, there is no apparent reason at this time to question claimant's testimony regarding the trauma he sustained while driving for respondent or the progression of his symptoms. Indeed, the medical records indicate that claimant worked for years despite his chronic back pain.

The undersigned finds that claimant sustained repetitive traumas to his back through the last day that he physically worked for respondent, which was on or about May 25, 2010. And the Workers Compensation Act provides that the date of accident for repetitive trauma injuries is determined by K.S.A. 2009 Supp. 44-508(d), which states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized physician takes the employee off work** due to the condition **or restricts** the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the **employee gives written notice** to the employer of the injury; or (2) the date the condition is **diagnosed as work related, provided such fact is communicated in writing to the injured worker**. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[5]

In short, the legislature has adopted the following benchmarks for the date of accident for repetitive trauma injuries and in the following order:

[5] K.S.A. 2009 Supp. 44-508(d) (emphasis added).

1. The date the *authorized physician* takes the employee off work due to the work injury or restricts the employee from performing the work that caused the injury.

2. The date the employee gives the employer *written notice* of the injury.

3. The date the condition is diagnosed as being work related, *provided* that fact was communicated in writing to the employee.

4. And if none of the above apply, the date as indicated by the evidence but *in no event* the day of the regular hearing or the day before the regular hearing.

The first option set forth above does not apply as respondent did not appoint an authorized treating physician. Similarly, the second benchmark does not apply as the record fails to establish the date claimant provided respondent with written notice. Likewise, the third option does not apply as the record fails to establish claimant notified respondent in writing that his repetitive trauma injury was work-related. Whether claimant's date of accident under K.S.A. 2009 Supp. 44-508(d) is ultimately deemed to be the last day of work or later, claimant has established for preliminary hearing purposes that he provided respondent with timely notice of accident as the notice to respondent on June 3, 2010, is within 10 days of May 25, 2010. In short, notice was timely under K.S.A. 44-520.

In summary, the Preliminary Decision should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[6] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Marcia Yates Roberts dated September 17, 2010, is affirmed.

[6] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge